

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

2. The petitioner's wife testified at the hearing on behalf of her husband. Her testimony was credible.

3. After executing wills, the petitioner and his wife decided to turn over their certificate of deposits to two of the daughters including the wife's daughter and the petitioner's younger daughter. On December 6, 2004, the petitioner and his wife transferred a certificate of deposit in the amount of \$21,592.92 to both daughters. On December 7, 2004, the petitioner and his wife transferred a second certificate of deposit in the amount of \$20,160.25 to both daughters.

4. After transferring the certificates of deposit, the petitioner and his wife decided to transfer their home to the two daughters. The transfer took place in December, 2004. The petitioner and his wife had changed the family home into a duplex. The petitioner and his wife would continue to live in their home on the first floor; they insisted on paying their daughters \$100 per month rent. Petitioner's wife believes the fair rental value of their unit is \$1,000 per month.

5. The petitioner and his wife used an attorney for the transfers who explained that transfers made within three years of applying for long-term-care Medicaid could affect their eligibility.

6. According to petitioner's wife, they were not thinking about long-term-care; they believed they would have no need of long-term-care. Petitioner's wife testified that they were in reasonably good health at the time of the transfers. When questioned about information in the Northwestern Medical Records about petitioner's health history, petitioner's wife testified that the report of skin cancer was from the 1970s. Petitioner's blood pressure and high cholesterol had improved and he was no longer taking medications. The petitioner had suffered a stroke in 2002 from which he recovered. When the petitioner had his stroke in 2002, the doctors informed them petitioner had emphysema. Petitioner was a smoker and had a smoker's cough. Petitioner had mild confusion and sometimes lost keys. At the time petitioner and his wife transferred assets, the petitioner was active doing home maintenance, driving individuals to their medical appointments in Franklin and Chittenden counties for the local Medicaid transportation provider, mowing lawns, and socializing and playing cards at the American Legion.

7. According to petitioner's wife, they did not want their two daughters to wait until the petitioner and she were dead to be able to use the monies from the certificates of

deposit and to have the benefit of owning the house. One daughter was returning to school and could use the monies towards her tuition. They felt secure with their social security. They were not using the certificates of deposits. They also made a decision to favor the two daughters who had grown up in their household.

8. Petitioner was helping his son-in-law do repairs including carpentry work and painting at a granddaughter's home during September, 2005. On September 28, 2005, petitioner suffered a traumatic accident when he tripped and fell into the cellar way and onto the cement floor sustaining a concussion and contusions. Petitioner was hospitalized at Northwestern Medical Center. Petitioner was then transferred to Haven Health, a long-term-care facility, on October 5, 2005.

9. As a result of the September 28, 2005 traumatic accident, petitioner's health deteriorated. Petitioner experienced right side weakness and pain. As a result of the deterioration in his health, he now requires extensive assistance with activities of daily living including bathing, toileting, dressing, mobility and transferring from his wheelchair.

10. Petitioner applied for long-term-care Medicaid on December 6, 2005.

11. Petitioner remained at Haven Health until March 30, 2006.

12. Petitioner was denied long-term-care Medicaid on March 17, 2006 based on the Department concluding that petitioner had transferred assets for less than fair market value in order to qualify for benefits. A penalty period was imposed until October 22, 2007.

13. In order to pay Haven Health for petitioner's care, petitioner and his wife asked their two daughters to use the monies from the certificates of deposit. The daughters paid approximately \$32,000 from the certificate of deposits to Haven Health.

ORDER

The Department's decision should be reversed.¹

REASONS

The Medicaid program is designed to provide medical assistance to the aged, disabled, blind or families with

¹ The petitioner raised the issue that the length of the proposed disqualification was incorrect. Based on the decision that the disqualification should not have been imposed, we do not need to reach this issue.

dependent children who have insufficient income and resources. 42 U.S.C.A. § 1396. An applicant must meet certain criteria in order to qualify for benefits.

Part of this determination includes a review of any transfers during a look-back period. The look-back period is 36 months. 42 U.S.C.A. § 1396p(c)(1)(B)(i). If an applicant transfers assets for less than fair market value during the look-back period, the applicant will be ineligible for Medicaid unless there is a satisfactory showing that the applicant transferred the assets exclusively for a purpose other than to qualify for benefits. 42 U.S.C.A. §§ 1396p(c)(1)(A) and (2)(C).

Vermont has adopted regulations that address situations in which the Department will not impose a penalty upon transfers made for less than market value. M 440.3. The relevant sections of M 440.3 state:

The Department does not impose a penalty period for transfers made by members of the financial responsibility group for less than fair market value that meet one or more of the following criteria.

(d) The member has documented to the Department's satisfaction that the transfer was made exclusively for a purpose other than qualifying for Medicaid. There is a rebuttable presumption that the resources were transferred for the purpose of establishing or maintaining eligibility for long-term care. The presumption is rebutted only if the individual produces convincing evidence that the resources were transferred

exclusively for a purpose other than to become or remain eligible for long-term care. A signed statement by the individual is not, by itself, convincing evidence. Examples of convincing evidence are documents showing that:

- the transfer was not within the individual's control (e.g. was ordered by a court);
- the individual could not have anticipated long-term care eligibility on the date of the transfer (e.g. the individual became disabled due to a traumatic accident after the date of transfer); or
- a diagnosis of a previously undetected disabling condition leading to long-term care eligibility was made after the date of transfer.

Petitioner's case falls within the above rebuttable presumption. A traumatic accident on September 28, 2005 precipitated petitioner's decline and subsequent disability. Prior to the petitioner's accident, petitioner was active both with his family where he maintained his own home and helped family members with painting, carpentry, mowing and other repairs and with the community where he provided a needed transportation service driving people to medical appointments within a two county area and engaging in social activities at the American Legion.

Petitioner provided the Department with written documentation of his traumatic accident and subsequent need for long-term care services. In doing so, petitioner turned

the issue into whether his earlier transfer of assets had been for a purpose other than qualifying for Medicaid.

The parties have raised the question of how M 440.3 is to be interpreted. The underlying federal statute asks for a "satisfactory showing" that the transfer was made for a purpose other than qualifying for benefits. 42 U.S.C.A. § 1396p(c)(2)(C). The Department seems to argue that the petitioner can only meet this requirement through the use of documents or a written record. In addition, the Department has used a cursory listing of petitioner's prior medical history in the Northwestern Medical Center history and physical to presume that petitioner could have anticipated the need for long-term care when the petitioner and his wife transferred their assets.

This interpretation is too narrow. The verb "document" means "to support (an assertion or claim, for example) with evidence or decisive information". *The American Heritage Dictionary of the English Language*, Third Edition, pg. 546. The petitioner has documented his case through records showing an unanticipated disability and through the testimony of his wife showing that the assets were transferred not to qualify for future benefits, but to benefit certain children. The petitioner and his wife were advised as to the look-back

period when they made their transfers; they made those transfers believing they would not need these benefits in the subsequent three years.

The question is how to treat a rebuttable presumption. Vermont follows the Thayer rule or "bursting bubble" rule in which the burden of production alone is switched. Once the burden of production is met, the underlying legal issue needs to be reviewed based on all the evidence. V.R.E. 301(a), *Tyrell v. Prudential Insurance Co.*, 109 Vt. 6, 23 (1937) ("... the presumption does not have to be overcome by evidence; once it is confronted by evidence of the character referred to, it immediately quits the arena." at p. 23); *Chittenden v. Waterbury Center Community Church, Inc.*, 168 Vt. 478 (1998); *Gardner v. Department of Social Welfare*, 135 Vt. 504 (1977) (presumption that transfers were made to qualify for Medicaid could not be weighed as evidence after rebuttal offered). See also *Rocque v. Co-operative Fire Ins. Assn.*, 140 Vt. 321 (1981); *Ins. Co. of North America v. Miller's Mut. Ins. Assn.*, 139 Vt. 255 (1981); and *Estey v. Leveille*, 119 Vt. 438 (1957).

Petitioner met his burden of production. An unanticipated event debilitated petitioner approximately nine months after the petitioner and his wife transferred assets.

Documentation exists of that accident. At this point, one can no longer use the presumption that the petitioner transferred his assets to qualify for Medicaid. A full scale inquiry is necessary.

Reviewing all the documentary evidence and the testimony of petitioner's wife, the petitioner has made a satisfactory showing that he transferred assets with his wife for purposes other than to qualify for Medicaid. The denial of long-term-care Medicaid should be reversed. V.S.A. §3091(d), Fair Hearing Rule No. 17.

#